IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1914

No. 162

WILLIAM A. WRIGHT,
Comptroller General,
Petitioner and Cross-Respondent
vs.
LOUISVILLE & NASHVILLE RAILROAD CO.
and ATLANTIC COAST LINE RAILROAD CO.
Respondents and Cross Petitioners

Writ of Certiorari and Cross-Writ to the United States Circuit Court of Appeals for the Fifth Circuit.

REPLY BRIEF FOR RESPONDENTS AND CROSS PETITIONERS.

Respondents and cross petitioners desire to correct certain statements in the briefs filed for William A. Wright, Comptroller General, and to reply briefly thereto.

I.

The counsel for the Comptroller General have misconceived the purpose of the complainants in the Court below, in stating that they have sought to narrow the

point to be decided to the technical sufficiency of the particular assessment sought to be enjoined.

What the complainants have sought to have decided was:

1. That the Georgia Railroad & Banking Company who offered to make returns of the entire railroads and property assessed by the Comptroller, was the proper tax payer, and that complainants were not,

2. That the proper method of taxation was that prescribed by the charter of the Georgia Railroad & Banking Company except as to the Macon & Augusta, and Washington Branch, Railroads which the Comptroller was taxing to it **ad valorem without controversy** and as to which he avers he is willing for it to pay the taxes.

3. That the Lessees of the Georgia Railroad were not taxable under the laws of Georgia upon any **separate** interest or estate in the property in their possession under the Georgia Railroad lease.

4. That the Comptroller's assessment did not purport to levy any assessment on any leasehold interest; but sought to assess the entire fee simple interest, as an estate in possession, to the complainants as owners.

5. That such being the assessment, and the same not showing the value or interest of any less estate than the fee, and not being capable of being divided, it is no foundation for a levy of taxes on any such smaller estate or interest, so that the entire levy is illegal and must fail.

II.

The citation on page one of the Brief of Mr. Sibley should no refer to the Act of December 27th, 1831. It should be the Act of December 21st, 1833, Section 15. The Act of December 27th, 1831, is an Act which is repealed by the Act of 1833, Section 23, and is alluded to therein only for the purpose of being so repealed.

III.

There is nothing in this record which indicates that the Comptroller General, as stated on page five of the brief, was ignorant, or acted on any misapprehension of facts, prior to the year 1910, or that he ever ceased levying taxes against the Georgia Railroad and Banking Company as the proper tax-payer until the decision of this Court in the case of Wright, Comptroller General, vs. Georgia Railroad & Banking Company 216 U. S., 420, demonstrated that the effort on the part of the Comptroller, to tax this property in a method different than that prescribed by its charter, was illegal.

With the handing down of this decision the Comptroller adopted the policy of refusing to receive a return from the tax payer whom he had recognized for twenty-eight years, and reversing his policy of regarding the owner, and not the tenant, as the proper tax payer, he then refused to receive a return of its property for taxation (except the Macon & Augusta Railroad taxed **ad valorem)** from the owner and demanded that the tenants, Louisville

and Nashville Railroad Company and Atlantic Coast Line Railroad Company should return (not their interest, or any less estate in the property, but) the entire property, and the entire interest and estate therein. (See original bill paragraph 10, original answer paragraph 10. Transcript, pp. 3, 16.)

The Comptroller emphasizes this by stating in his said answer, paragraph ten, that he notified both the Georgia Railroad & Banking Company and the Lessees that he refused to receive returns from the former and would require returns to be made by the latter. (Transcript, p. 16.)

This also should defeat the contention now insisted upon in this case that under this assessment, the comcomplainants in the case were required to return any particular interest which they had in the property separate and apart from that of the owner, the Georgia Railroad and Banking Company.

This is emphasized by the admitted fact that as to the Macon & Augusta Railroad he was content to receive returns from the Georgia Railroad & Banking Company alone, because on this property he collected taxes ad valorem. He made no demand for any separation of interest of lessor and lessee.

IV.

On page six of the brief of Mr. Sibley, it is stated that no complaint is made of the amount of the assessment.

This averment is without significance unless it is intended to convey the meaning that the amounts of the assessment are conceded to be reasonable. This, however, is entirely unwarranted by the record in a case where the complainants were insisting that they were not the tax payers at all, but that taxes had been assessed against them when the taxes should have been assessed against another. An effort to litigate, or question, the amounts of the alleged illegal levy would have been entirely irrelevant.

Furthermore, it would have been a matter which a Court of Equity would not in this litigation consider.

Norwood vs. Baker, 172 U. S., 269, 294.

V.

On the same page counsel states that complainants sought by exceptions for impertinence to restrict the inquiry to the naked question of injunction of the assessment as it stood. This is entirely correct.

It is respectfully insisted that the final opinion and decree of the District Court demonstrate that it should have so restricted the inquiry. If this assessment as a whole is illegal, it did not furnish the data, nor could the Court be put in the position, to ascertain, or decree, what was the amount of taxes actually due.

The Court in his opinion, while holding that the interest of the Lessee Companies in the Atlanta Terminals is subject to taxation ad valorem, states "There may be

some part of this terminal property which amounts to a mere betterment of the old property, and not thus subject; but what that may be I am unable at present from the facts before me to determine. Counsel agree, as I understand it, that should this property be so subject it would require either a reference, or some further action, to determine this". (Transcript, p. 70).

It was stipulated in the agreed statement of facts that "If under the pleadings, and this statement, it is finally decreed that some part of said property is subject to taxation, the taxable valuation thereof is to be ascertained by such proceedings as are lawful and proper." (Transcript, p. 61).

Yet in entering the decree on the assessment attacked, it is decreed "that the Atlanta Joint Terminals are subject to ad valorem taxation. * * * * As to the assessment and the enforcement of collection against said Atlanta Joint Terminals an injunction is refused and denied." (Transcript, p. 72).

The Court would have avoided this inconsistency and the sustaining of a taxation upon property, as to which he rules that the facts do not show what part is taxable, and as to which the Agreed statement of facts concedes that further proceedings are necessary to separate the taxable from the non-taxable, had the Court recognized, if the assessment was not sustained as an entirety, on the theory that the whole property of the Georgia Railroad & Banking Company should be assessed ad valorem upon its fee simple value in the hands of these tenants,

that the assessment was illegal, and that the enforcement of taxation under such assessment should be enjoined.

It is true that the bill prays for a decree adjudging that these complainants were not chargeable with taxes, or any part of them, on the property included in the assessment aforesaid. But taking the prayer, with the averments, all it meant was that they were not chargeable with the taxes claimed, or any part of them, upon the property included in the assessment under the scheme and scope of such assessment. If there was any indivisible part of said property, or any less interest therein, which was so taxable, nevertheless, this assessment, and taxation thereunder should have been enjoined without prejudice to another assessment, if such other assessment could be lawfully made.

For the Court under this assessment to undertake to separate property, or apportion interests and adjudge values, even if there were some taxable interest, makes the Court act as the tax assessor or tax gatherer, and converts this litigation into one in which a decree would have been rendered against the complainants on a theory presented which practically amounts to saying "the comptroller has made an illegal levy, and has sought to make the tenants of this property pay **ad valorem** on the entire value of this property in entire disregard of the provision of the charter of the Georgia Railroad & Banking Company, but the Court while holding this to be illegal, will make a new levy and a new assessment upon such part of, or interest in, this property, if any, as it may find subject to **ad valorem** taxation in the hands of complainants."

VI.

Counsel on page ten of the above quoted brief says that "Complainants are in possession of the property enjoying its use. Presumptively it is taxable, and they owe the taxes." While as a general statement it might be admitted, **Possession prima facie** indicates ownership; and that presumptively property is taxable to the owner, the statement is wholly inapplicable to a case where it is conceded that the Georgia Railroad & Banking Company is the owner of the property, and is in possession by its tenants; that the complainants are in possession only as tenants of such owner, and that the owner is enjoying the benefit of its property as landlord, receiving rent on a contract of rental for a limited term without provision for renewal; and further, where the property was created subject to a method of taxation prescribed by the charter under which it was created, which is a public law of the state with knowledge of which every one stands charged. The charter itself provides in Section 23 "that this act of incorporation shall be deemed and taken to be a public act and shall be judicially taken notice of as such without special pleading."

As a matter of history it can be stated that at the time this Act was passed and for many years thereafter, there was no taxation of railroads under the general tax statutes of the state, but taxes thereon were collected solely by virtue of the provisions of the several charters of the different railroads, and all of these charters universally provided taxation by a collection of a per cent upon the earnings. Further, that the first general statute taxing

railroads laid the tax of one-half of one per cent. on earnings where no charter contract existed.

Georgia Acts of 1858, p. 105;
Georgia Acts of 1861, p. 81.

This method of taxation continued until the year 1874.

Georgia Acts of 1873, p. 65.

This is a part of the railroad tax history of the State of Georgia. The taxation of railroads ad valorem was first made the policy of the State by the Act of 1874.

Georgia Acts of 1874, p. 107.

VII.

The counsel on page twelve of his brief says "the statement of fact having been prepared by the complainant, if its language or silence raises doubts as to the status of any property, the doubts should be resolved in favor of taxation."

The same vice is expressed in this conclusion as that which pervades this entire argument, i. e. That if the statement of facts demonstrates that the assessment of the Comptroller was illegal and void, if it suggests that another, different and legal assessment covering an unknown part of the property could have been made, the Court should deny relief.

But the statement that the "Statement of Fact was made by the Complainant", is not correct. It was made

and agreed to as the joint work of the Complainants and Defendant and as such it is signed by counsel for both sides. (Transcript, p. 61.)

It does not appear who was the scrivener, but it is evidently adopted, corrected and assented to by both sides and is in law and fact equally prepared by both sides.

It is stipulated therein, that the assessment made is not sufficient to support the taxation of **a part** of the property as it concludes that if a part is decreed to be taxable, "the valuation thereof is to be ascertained by such proceedings as are lawful and proper". This could only be a new assessment.

Norwood vs. Baker, 172 U. S., 269;
State vs. Taylor, 72 Texas, 297.

VIII.

On the same page twelve counsel says that the taxing method prescribed by the charter of the Georgia Railroad & Banking Company "is pertinent in dealing with that company as to any taxes it may owe, but wholly irrelevant in dealing with the complainants, **about any taxes they may owe.**"

It is submitted that this criticism wholly loses sight of the fact that what the Comptroller General has attempted by this assessment, is to make the lessees pay the taxes formerly demanded from the lessor company, which is still the owner of the property which is an active

going concern, which has not parted with its property, but which has leased the property with all of its incidents, and he is attempting to apply to such a condition the rule which pertains where a railroad possessing a tax exemption has either itself sold, or been under judicial process sold out, and the company's entire property has gone to another owner.

This contention also shows that the counsel for the Comptroller is seeking to change this case from an attempt to hold these complainants liable as the sole payers upon all interests in the entire property assessed, to an inquiry as to whether the complainants may have some property, or some interest in the property, upon which an assessment for taxation, based upon other principles, could be levied.

It is excedingly pertinent to consider the limitations on the taxing power contained in the charter of the Georgia Railroad & Banking Company where it is conceded that the Georgia Railroad & Banking Company remains the complete owner (as it is) of the railroad and property described in the lease contract.

IX.

On page seventeen of the same brief counsel says that the true question is "is the property assessed against complainants or any part of it, or any interest in it taxable to them". This is not the true question. To so make it would be to convert the Court below into a taxing officer. The question in the case is "can the Comptroller General

sustain an assessment made of this property to these tenants as the parties bound to pay the taxes due thereon and all of the taxes due thereon?" It is a case in which he has **refused** to receive a return from the owner and demanded that the tenant shall, in the place of the owner, return the entire property and every interest thereon, and pay taxes upon the whole, **ad valorem,** without regard to the charter.

The position on page eighteen et. seq. of the above brief that Taxes are chargeable to the "owner" of property is sound.

But who is the "owner" in this case? The Georgia Railroad & Banking Company, the landlord and owner in fee simple, presented a tax return for the property. The Comptroller General notifies it that he will not receive such return from it as owner (although he has been so doing for twenty-eight years) but that its tenants must make returns of the entire estate.

Illustrations are given of certain classes who are treated as owners—

The owners of mineral and timber interests are instanced. But this means that one who **owns** the mineral interest, is to return that for taxation and he who owns the **other** interests return them.

As to Life Tenants (including dower and homestead estates), there the remainder estate is a deferred estate. It is wholly unlike a tenancy where the posession of the tenant is in the right of the landlord and is his posses-

sion. It does not alter the rule of the Common Law that while Life Tenants pay the taxes on the entire property, in the case of estates for years the landlord pays all of the taxes thereon.

Cooley on Taxation, pp. 818, 822.

The quotation on page twenty of the brief for the Comptroller from 140 Ga., 593, does not illustrate who is the "owner", as between landlord and tenant, who should pay the taxes, or whether the taxes due on the premises owned by the landlord when fixed by a contract between it and the State can be ignored and the entire estate taxed to the tenant on a different basis.

The gist of the decision is expressed in the first and succeeding sentences thereof as follows:

> "Want of title in the defendant to the premises "on which the lien is claimed and alleged title in a "third person, who is no party to the suit will not "bar an action for foreclosing and enforcing the "statutory lien of a materialman. If the defendant "has any interest in the premises upon which the "lien can take effect that interest is bound." (Cit- "ing several cases.)

Wilson vs. Chamberlin, 140 Ga., 593.

The sentence which immediately follows the quotation made by the Comptroller's counsel also shows its irrelevancy in the instant case. That sentence is:

> "That a laborer or mechanic is entitled to a lien "on whatever interest his employer had in the prop-

"erty at the time the work was done, or the mater-
"ials were furnished, has been recognized by this
"Court in a number of cases (citing seven cases)"
Ib.

The facts of the case showed that the building was erected by a lessee for years in accordance with plans and specifications agreed on with the owner, and that the building became the property of this landlord at the termination of the lease.

XI.

The statement on page twenty-four that the word "assigns" is incompatible with a tenancy and indicates a right to assign without consent is an error. It is the appropriate expression in a contract of lease creating only an usufruct, not assignable without consent of the landlord, to be used to give his precedent consent to the making of assignments which otherwise the tenant could not make.

XII.

The sub-head of the brief in behalf of the Comptroller above alluded to, again discloses the attempt of counsel for the Comptroller General to divert the question raised in the brief of complainants from the legality of the effort of the Comptroller General to refuse to recognize the Georgia Railroad & Banking Company as tax payer, and to compel the complainants to occupy the position of the sole tax payers of this property, into an inquiry as to whether complainants owned at least a taxable interest.

We have argued in the brief in chief that whether complainants have merely a usufruct, or an estate for years at common law, under the principles, and methods, of taxation prevailing in the State of Georgia, the Georgia Railroad & Banking Company as the landlord and owner is liable for the taxation of the entire property, including the leasehold interest, and that, there are no provisions of the statutes of Georgia for separating the interests of landlord and tenant, and taxing the same separately to each. We desire, however, to correct a few errors of statement contained in this sub-head of the brief, for example:

On page thirty it is said that $6,311,363.08 has been expended for additions, betterments and improvements to the leased property; also further down on the page it is stated; "To say that 6,000,000 of dollars of taxable funds of foreign corporations invested in Georgia by them for their own benefit and use can be screened from equal taxation as "stock of Georgia Railroad & Banking Company, is absurd."

The figures above named are taken from the Agreed Statement of Facts, as to the total amount of money which has been expended upon the Georgia Railroad & Banking Company for such additions, betterments and improvements, including the rolling stock for use therewith, since the lease. The following, however, has been omitted;

"Of this sum $4,633,512.77 was paid out of the net income of the leased property under the heads of "Road-

way & Structures and Rolling Stock Equipment" (Transcript p. 50).

Much of this is shown by the items to have been ordinary replacements of the rolling stock. Much of it has actually replaced the rolling stock turned over to the lessee at the time the lease was made. (Transcript pp. 52, 53). The only money, outside of actual earnings of the property, spent on, and in connection with, the property is the sum of $1,677,850.31. (Transcript, p. 51).

XIII.

We have discussed in the brief in chief the meaning of the Code Section 1008 providing for the return for taxation of mineral and timber interests.

We have also discussed the inapplicability of this argument to sustain the assessment made by the Comptroller General seeking to require the lessee to pay taxes for the entire value of the property, and not seeking to divide the estates or interests therein. Indeed a sentence upon page thirty-two of this brief sustains fully the attack which we have made upon the Comptroller General's action in this case. That sentence is this: "But **when as here** the alleged owners are taxable by **different rules** it is not only the right but the duty of the tax officers to separate the taxable interests and enforce the Constitutional ad valorem taxation as far as it may be enforced."

In this case the Comptroller General repudiated this

alleged right and duty. He refused to receive the tax returns from the landlord owner; he refused to make any attempt to separate the property or interests upon which he claimed the lessee was separately taxable. His contention and his attempt was to refrain from separating the taxable interests, now claimed by his counsel to exist, to different persons, and to insist that the lessees should pay ad valorem taxes upon property owned by the landlord upon which the charter method of taxation was wholly different.

To demonstrate that his entire attempt was to have **some one** pay ad valorem taxes on all of the property, it is only necessary to consider his action as to the Macon & Augusta Railroad. As to this, he accepts a return and taxes from the Georgia Railroad & Banking Company, although if he had applied the above contention of his counsel he should have required the return of the leasehold estate from the lessees and of the reversion in fee from the Georgia Railroad and Banking Company. (Comptroller's answer, Transcript, p. 17).

XIV.

As to the authority cited by counsel for Comptroller General in regard to taxation on betterments, it is evident that the case cited from Missouri (19 Mo., 501) means that where the lessee places improvements on property which remain his, and which he has the option to remove unless he is compensated therefor at the expiration of the lease, such lease will be construed to mean

that these improvements are not the property of the lessor, at all, unless lessor elects to pay for them, and then they become the lessor's property. That is entirely different from the situation in this lease. The clause quoted on the succeeding page of this brief, page thirty-five, shows that the property substituted for, or added to, that received by the lessees from the landlord becomes **at once** the property of the landlord to the same extent as the original property. There is no option on the part of the lessor to pay for it, but the property which has thus become, and is at all times, the property of the lessor is to be paid for by it at the end of the lease.

The status of the Rolling Stock is clearly shown by the provisions in the lease quoted on page thirty-five. The natural, obvious and indisputable construction of the phrase "shall be the property of the party of the first part" is that in the future period, immediately following the date of the Lease, **whenever** new rolling stock is acquired, it became then and there the property of the Lessor. This being so, the rolling stock is **not** "Clearly the property of complainants and taxable to them" (page thirty-four); and the complainants, the lessees, "can **not**" put it on another road if they wish." (Page 35.)

XVI.

Supplementing the argument made as to the fact that these lessees are not taxable as to the stocks and bonds mentioned, it is admitted in the brief last above mentioned, that all of these stocks and bonds "have been as-

signed to Lessors who held the title to them for the time being". It is perfectly evident that these stocks and bonds did not relate to the management of the railroads leased by the Georgia Railroad & Banking Company, being stocks and bonds of separate corporations, some of them in foreign states. To speak, therefore of these stocks and bonds as being taxable to these defendants, is to assert the right of the State of Georgia to tax non-residents upon personal property because such personal property would be taxable if owned by corporations of the State.

There is another error in this brief which we desire to correct. On pages thirty-six and thirty-seven it is asserted, as it is also asserted in the supplementary brief filed by the Hon. John C. Hart that $700,000.00 has been raised in bonds and invested in a depot in Atlanta and a round house in Augusta in purchasing steel rails and relaying track rest at Madison, Georgia. This is an error. Of these amounts $200,000.00 was raised in 1854 by bonds to relay the line of railroad west of Madison, Georgia (transcript, page 49). The purpose for which this money was spent, shows that it was the mere replacement of the original track. We are warranted in stating that these bonds were many years ago repaid from the earnings of the property. A history is given of the Georgia Railroad & Banking Company bonded debt. (Transcript, p. 55.) These bonds do not appear as furnishing any of the considerations for which other bonds of the Georgia Railroad & Banking Company were issued, although the account goes back to the year 1876. The remaining $500,000.00 do not appear to have ever been raised by bonds, but

$200,000.00 appear to have been spent in 1868 to build a depot in Atlanta and a round house in Augusta (doubtless, replacing those destroyed), and part of this sum seems also to have been spent to relay track and purchase cars (an absolutely current expense) $300,000 in money seems to have been spent also to purchase steel rails for the purpose of being laid on the railroad (Transcript, pp. 49, 57). Therefore, the argument that this $700,000.00 represents anything but the railroad with improvements made from time to time, which the necessity of an enlarging business and improved maintenance naturally demanded and was property necessary to make the net income upon which the charter scheme of taxation rested is unfounded. As such, it was "subject to a tax not exceeding one-half of one per cent. on the net proceeds of their investments."

Wright, Comptroller General, vs. Georgia Railroad & Banking Co., 216 U. S., 420, 422, 425, 432.

XVII.

There is nothing peculiar in the Athens and Augusta Terminals, (Sibley Brief, p. 37.) They are betterments and additions to "the same property", the same railroad, and are in the same status as new rails, new rolling stock, etc. The actual terminus of the railroad stopped short of its charter terminus, Athens, and the railroad was extended. It is admitted by the Comptroller that title to all of the land needed for the extension was taken in the name of the lessor.

The Augusta Terminals were too contracted for the enhanced business and land was acquired for larger ter-

minals—and the titles taken in the name of the lessor. In the Gardner case, the Supreme Court of the State held that this was within the scope of the charter.

XVIII.

The last head of this brief "Practical Results" sets forth views, doubtless most admirable in themselves, but unfortunately without legal support. We point out the confusion made by Counsel in the last paragraph forty-one, and elsewhere in the case of the rental $600,000.00 with the net earnings of the chartered property. The difference between them is distinctly and elaborately set forth in the Agreed Statement of Facts. The rental is paid for a large amount of property of which the chartered property is only **a part** (Macon and Augusta Railroad, etc.) From the commencement of the lease the net earnings of the chartered part of the property have been carefully ascertained annually and the charter tax has been paid on **them**. They have generally been less than the rental though in a few years they have exceeded the rental. The rental, $600,000.00, has never been the basis of the tax of one-half of one per cent. on the earnings.

After all is there not this final proposition in the case? Whoever is liable for tax on the chartered property whether lessor or lessee, the **kind** of tax is the tax fixed by the charter.

XIX.

Replying briefly to some points in the brief of Hon. John C. Hart we observe:

1. The language, used on **page 10** of the brief, to show that the parties to the lease intended more than the **use** of the property, shows exactly the contrary. "Such privilege" refers to the privilege of "transporting persons, merchandise, produce and every kind of property whatsoever". The words "in this behalf" refers to the same things, that is to say the privileges and obligation relating to the use of the property.

2. When the brief writer on **page 12** states "The Estate for years taxable", what does he mean to assert? That the tenant for years has an interest, a valuable property, in his tenantcy, in his right of possession and control of the premises, which is taxable? Or that the tenant for years pays all taxes for which the fee is liable? If the first proposition is the one meant, then while we deny it, we say: Even if it were true, the question does not arise in this case". If the second proposition is asserted, viz: that the tenant for years is liable for the taxes chargeable on the fee, while denying that, we ask "**What** taxes are chargeable on the fee". The most comprehensive view urged by Appellant of the scope of Appellees' interest does not accord to them the fee, but at most an estate for years. Now the most that can be deduced from this is that the life tenant or tenant for years must pay the taxes for which the fee is liable. The carving of an estate for years out of the fee may create a new subject of taxation, assessable to the owner of that new subject; or it may make the tenant liable to pay the taxes assessable to the fee; but can it change the status of the fee in its relation to taxation? In other words, if the fee is not taxable, does it, the fee, become taxable by having a less estate

carved out of it? This, cleared of all confusion, seems to be the contention of appellants. It is admitted that if the lessor resumed tomorrow the operation of its railroads, they would be taxable by the charter method only; but it is contended that if the operation of them is turned over to another person, a tenant for years,—**they**, the railroads,—**not the interest which the tenant has in them,** become immediately taxable, by a different method on a different valuation and at a different rate.

3. The case of Penick vs. Atkinson, cited on **page 14** furnishes no support to Appellant's contention. It simply decides that taxes are assessed against **the fee,** in this case a "base fee", a fee subject to be defeated.

XX.

4. Appellant clings most tenaciously to the fact, as one favorable to him, that the lessee agreed to pay taxes. See brief, page **19.**

Let it be answered once for all, that at the date of the lease, the lessor held two kinds of property, one taxable under its charter in a special way, and the other admittedly subject to **ad valorem** taxes, as for instance the Macon and Augusta Railroad; and might thereafter acquire other **ad valorem** taxable property. The lessee agreed to pay the taxes on this latter class of property. There was nothing in this agreement that admitted that otherwise non-taxable property would become taxable when leased, or that the lease would make it so.

5. The "conclusion", brief page 21, is a virtual surrender of the case except for a judgment for taxes on the value of a leasehold estate. That this cannot be properly awarded under the assessment made, or in this case, we have heretofore discussed and most earnestly contend.

JOS. B. CUMMING,
ALEX C. KING,

Of Counsel for Respondents and Cross Petitioners.

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Supreme Court of the United States

OCTOBER TERM, 1914

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PETITIONER

versus

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RESPONDENTS

AND

LOUISVILLE & NASHVILLE RAILROAD COMPANY, AND ATLANTIC COAST LINE RAILROAD COMPANY,
CROSS-PETITIONERS

versus

WILLIAM A. WRIGHT,
Comptroller General, etc.,
CROSS-RESPONDENT

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

ADDITIONAL BRIEF FOR RESPONDENTS AND CROSS-PETITIONERS.

BY JOS. B. CUMMING,
Of Counsel.

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Respondents,

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Cross-Petitioners,

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WILLIAM A. WRIGHT,
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Cross-Respondent.

Writ of Certiorari and Cross-Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

ADDITIONAL BRIEF FOR RESPONDENTS AND CROSS-PETITIONERS

By JOS. B. CUMMING

STATEMENT OF CASE.

May 7, 1881, The Georgia Railroad and Banking Company rented all its railroad properties to William M. Wadley and his assigns for a term of ninety-nine years. (Record 8.)

By various mesne conveyances Appellees now hold, and have held and operated for a number of years, said properties under the agreement between the Railroad Company and Wadley.

July 26, 1910, the Comptroller General of the State of Georgia, reciting that the Appellees had failed to return said properties for taxation, proceeded "in obedience" as he claims, "to the statutes in such cases provided" to assess all of said properties for ad valorem taxes for said year at an aggregate valuation of $17,883,306.

Thereupon Appellees sued out an injunction in the Circuit Court of the United States for the Northern District of Georgia—the main contention of the Complainants in the Bill of Injunction being that, as to the great bulk of the property assessed, they were only tenants and that they were not—but the landlord alone was—liable for the taxes.

The cause was heard on Bill and Answer and on Agreed Statement of Facts, and a Decree rendered granting the Injunction as to all the property involved except that part of it known as the Atlanta Joint Terminals. As to that part the Injunction was refused. Record 72.)

From this Decree the Comptroller General entered an Appeal to the Circuit Court of Appeals, U. S., for the Fifth Judicial Circuit, and thereupon the Complainants entered a Cross Appeal as to so much of the Decree as refused an Injunction as to the Atlanta Joint Terminals. (Record 73, 76.)

The Circuit Court of Appeals sustained the Decree of the District Court both in the grant and the refusal of the Injuction. (Record 98.)

Thereupon the Comptroller General petitioned this

court for, and obtained from this court, a Writ of Certiorari; and the Complainants in the Bill petitioned for, and obtained, a Cross Writ of Certiorari. (Record 101-102.)

BRIEF AND ARGUMENT.

What this case is not:

It is not a case, in which the Comptroller General of Georgia seeks to tax a leasehold estate.

The assessment made by the Comptroller General, on which this case is based, was of the whole property owned by The Georgia Railroad and Banking Company and leased by it to Complainants; and not an assessment of any leasehold interest which Complainants may have in that property. (See assessment, page 14 of printed record and opinion of District Judge, page 61 of the record.)

If this proposition is correct,—and it is sustaned by the record—it disposes finally of any argument based on the case of Jetton vs. The University of the South, 208 U. S., 489 (See opinion of District Judge, pages 68-69 of Record).

This disposes also of the second assignment of error (Record page 73) as the case as made presents no feature, to which that assignment applies.

The first, third, fourth, fifth and seventh assignments of error (Record, pages 73-74) can be treated together as they all depend on one question. That question is: Is the property, covered by the charter of the Georgia Railroad and Banking Company subject to taxation when operated by parties, who rent it, although it is not sub-

ject to taxation when operated by the owner, the landlord, who has rented it out for a term of years?

There is the sub-question to be considered, viz: Of what does that property consist?

There was a stage in this litigation when the latter was an undecided open question—when it was contended that the charter covered property of the value of only $4,156,000, and that all the value of the railroad over and above that sum was taxable. But that question has been finally closed. Wright, Comptroller General vs. The Georgia Railroad and Banking Co., 216 U. S., 420. **passim.** In that case it is held:

> "Where the capital of a corporation is exempted "from taxation, the exemption continues, even if "the property appreciates in value; and where, as "in this case, it is evident that the legislature in- "tended that the taxation of the corporation should "be measured by the income, the exemption will not "be construed as limited to the then value of the "property, so that natural increases in value will "be subject to any other method of taxation than "that stipulated in the charter." (Wright vs. Ga. "R. R. & Banking Co., **supra,** Headnote.)

So far the decision might be held to extend the exemption of the charter to the excess valuation of the property, over and above the authorized stock, only so far as that excess was due to "appreciation," "natural increase in value", and not to such increase in value as resulted from the expenditure of money.

But further on in the opinion we find—pages 427-8, the following:

> "We come now to the question as to whether so "much of the value of the company's railroad and

"appurtenances as exceeds in value the amount of "the authorized capital stock, under the charter and "amendments prior to 1863, is subject to taxation "as other property of like character, under the law "of the State. This value, it is admitted, exceeds by "four millions of dollars the nominal value of the "capital stock of said company, which excess, it "is further conceded, has been the result of natural "increase in the value of said property and by re- "newals, alterations and betterments of the same, "from time to time, by said Company."

Again: (pages 429-430) "Under the original "charter and certain amendments there exists today "an authorized capital stock of $4,156,000. * * "* * * * The railroad property including its "railway, depots, equipments and appurtenances "proper, have a present value of some four millions "of dollars in excess of the authorized capital. Now "the contention is that to the extent of this excess "the property of the company is assessable and "taxable as other property. * * * * * * An "investment made nearly seventy-five years since "of $4,156,000.00 has now a value of $4,000,000.00 "in excess of that cost. The property is the same "property. The conceded fact is that through re- "newals, alterations and betterments made from time "to time and the natural increase in the value of the "road this appreciation has come about."

So that the property held by this court to be included in the scheme of taxation provided in the Charter of The Georgia Railroad and Banking Company is the railroad covered by that charter with its franchises, present equipment and present appurtenances, although the value of the property has doubled, and without any reference to its present value.

So we can consider as finally established the propo-

sition that the property assessed—at least the great bulk of it—is not subject to assessment, or to taxation, so long as it is operated directly by The Georgia Railroad and Banking Company; and, that while so operated, the only relation which that property has to the subject of taxation, is that its net earnings are subject to a tax of one-half of one per cent. The one main question, therefore, is: Has the lease of that property so changed its status that it has become liable to taxation, like the property generally of the people of the State of Georgia?

The leasing of the railroad was contemplated in its original charter as a probable and proper purpose. (See Section 12 of the charter, quoted in opinion of Newman, J., page 62.)

The scheme of taxation is found in the subsequent Section 15 of the charter (Ibid. Record, page 62). The provision for leasing and the scheme of taxation were contemporaneous, were made at one and the same time. No limitation was put on the tax scheme, which restricted its application to the property while it was used in one of the two proposed ways, viz: by the corporation, and prevented its application when the same property was used in the **other** of the two proposed ways, viz: by its lessee. It would seem that the property, having been impressed with this tax scheme, would remain so impressed until that scheme was expressly lifted from it—and there could have been no better time to make this change —if a change was intended—than when provision was being made for leasing. But no change was made.

The Comptroller General contends that the Lease has converted this non-taxable property into taxable. The process, it is contended, by which this transformation has been effected, is this: The Lessees acquired an **"estate"** by which they became the virtual owners of the property during the term of the Lease. (Again attention is called to the fact that the position of the Comptroller General

in making the assessment was not that the Lessees acquired an interest **in** the property and that such **interest** is taxable, but that the **property** itself belongs to the Lessees at least in its relation to taxation.

USUFRUCT.

The Appellees (in the main Appeal) say that they have no **"estate"** but only a **usufruct.**

The deed of Lease, under which these Appellees are in possession of the property clearly creates only a usufruct. Nothing would suggest any other idea except the conventional length of the term and the magnitude of the property. No title to any property for any length of time passed by that instrument from the Lessor to the Lessee, but "simply the right to possess and enjoy the use" (Language of Section 3691 of the Code of Georgia of 1910) of the property. It conveyed no interest **in** the property, but a mere right to use it.

In support of this proposition, attention is called to certain controlling features of the lease.

The Railroad Corporation's right in this connection under its charter was "to rent or farm out their exclusive right of transportation or conveyance." See Opinion of Newman, J., Record 64).

The Lease instrument followed this language exactly, and the main concession or grant from the Lessor to the Lessee was this "exclusive right of transportation", etc. The "renting" of the railroad itself and of its equipment was merely incidental to the main grant "as the means of full enjoyment" of the main grant. (Record page 9.)

By this action The Georgia Railroad and Banking Company did not part with the title or ownership of any part of its property for so much as a single day. It **simply granted the use of it.**

The Lessee is to "return the property hereinbefore rented, farmed out and assigned." (Record, page 11.)

The Lessor does not transfer title to any of its personal property. The Lessor not only retains its title to such property as well as to the real property, but provides that as such personal property is consumed in the using, that which is acquired **in its place** shall be the property of the Lessor. The same provision is made as to property legitimately **added** to the leased property. "And all the property substituted for and added to that which is hereby rented and farmed out shall be the property of the party of the first part", etc. (Record, page 11.)

The owner and Lessor retained the right to enter upon and inspect the rented property at its pleasure in the following provision of the Lease, to-wit: "The party of the second part (the original Lessee) covenants for himself and his assigns that the party of the first part (Lessor) shall have the right to enter upon and inspect the railroad hereinbefore mentioned and appurtenances, including the rolling stock used on the same, as often as the party of the first part may think proper." (Record, page 12.)

The owner and Lessor retained such relation to the property as to recognize its liability for any taxes lawfully assessed against it, and has regularly paid the same from the commencement of the Lease on the great bulk of the property, and as to the rest, stipulated with the Lessee that the latter should pay them. Such stipulation would have been unnecessary and uncalled for if, as matter of law, the Lessee was liable for the taxes. The State, too, has recognized this condition and has collected taxes from the Lessor up to the commencement of this litigation, to-wit: twenty-nine years. So that the position of the State, as presented by this litigation, is that for all that period it has been exacting taxes from a party that did not owe them.

The owner and Lessor did not relieve itself by the Lease from its liability to the public, or seek to do so. It "is held liable to the public just as if it were engaged in operating the railroad itself". (Record, page 65).

The owner and Lessor not only fixed a time limit to the use and operation of the rented property: it also made it a part of the arrangement between itself and its tenant that the Lessor "reserves the right, in addition to all other remedies now usual or hereafter to become usual in the law, to enter upon and resume possession and enjoyment of all its property for the breach of any of the covenants or agreements of this Indenture". (Record, page 12).

The facts make this clearly a case of **Usufruct** and not of an **Estate**.

PERSONAL PRIVILEGE.

It may be fairly contended—and these Appellees do contend—that the interpretation of the charter of The Georgia Railroad and Banking Company by this Court (Wright vs. The Georgia R. R. & Banking Co., **Supra)** stamps the **property** with the charter's particular scheme of taxation so indelibly that the **property**, so long as it exists, retains that quality under any and all circumstances; but Appellees are not driven by necessity to take that advanced position.

For if the foregoing contention is correct, namely, that The Georgia Railroad and Banking Company has parted with none of its property, but has only granted the use of that property to a tenant, the proposition that exemption from taxation is a "personal privilege", which cannot be transmitted from the beneficiary to another, has no application in this case. It would apply if the Lessor, or landlord, in this case had voluntarily

stripped itself of its property by a sale or absolute alienation, or had lost it by a judicial sale. But nothing of this sort has happened. The owner of the privilege is still the owner of the property, to which the privilege applied. The owner remains as subject to taxation as it ever was, and needs this protection as much as it ever did.

"The exemption from taxation must be construed to have been the personal privilege of the very corporation specifically referred to and to have **perished with that**".

Cooley on Taxation, 3rd Edition 377.

The Georgia Railroad and Banking Company has not "perished" by any means and is performing its functions just as closely in conformity with its charter in operating its properties through the Lease, contemplated by its charter, as if it had made no lease.

The "personal privilege" theory is derived from authorities where the facts were radically different from the facts in this case—cases where there was an absolute sale, judicial or otherwise, of the property enjoying the exemption—as in the leading case of Morgan vs. Louisiana, 93 U. S., 217, and the many cases following that decision.

In line with what has hereinbefore been shown of the action and non-action of The Georgia Railroad and Banking Company, indicating its continued living connection with the property, was the attitude of the State of Georgia itself until the commencement of these proceedings. Its courts have recognized and continue to recognize in the various suits against that Company, based on the acts and omissions of its tenants, that it is still the party responsible—and as responsible as ever—for the operation of these railroads; and the **executive branch of the State government has hitherto looked**

to that Company alone for its taxes. (See opinion of the District Judge, Record 65-66).

ESTATE.

This brief will not enter into an elaborate discussion of the technical law of Estates. That branch is argued fully in the brief of other counsel. However a few views on this aspect of the case are submitted.

The law of Georgia on the relations between the parties, created by a rent contract, is found in Section 3691 of the Code of 1910.

> "When the owner of real estate grants to another "simply the right to possess and enjoy the use of "such real estate, either for a fixed time or at the "will of the grantor, and the tenant accepts the "grant, the relation of landlord and tenant exists "between them. In such case no estate passes out "of the landlord and the tenant has only a usufruct, "which he cannot convey except by the landlord's "consent, and which is not subject to levy and sale; "and all renting or leasing of such real estate for "a period of time less than five years shall be held "to convey only the right to possess and enjoy such "real estate, and to pass no estate out of the land-"lord, and to give only the usufruct, unless the con-"trary be agreed upon by the parties and so stated "therein."

To meet the requirement of this Section in reference to the landlord's consent to any transfer of the contract by the tenant, the original contract was made to "William M. Wadley and **his assigns.**"

This Section contains two propositions:

(First) When a landlord grants to a tenant for years

merely the right to possess and use the leased premises, the tenant has only a usufruct—that is he acquires no title to, or ownership of, the leased property; and this limitation of the rights, acquired under the contract, applies to all contracts alike without reference to their length.

(Second) When the contract is for less than five years, the law presumes, in the absence of an express provision to the contrary, that the tenant has no estate—nothing he can transfer to another.

A third proposition may be sought to be **inferred**, and that is that where the contract is for more than five years, an estate does pass out of the landlord. But the Section does not say so, and such inference is not legitimate. The most that can be inferred from the silence of the Section at this point is that it is an open question whether an estate passed, to be determined by all the features of the contract.

So there is nothing in the length of the term of the Lease or in Section 3691, which enhances the quantity of interest acquired by the Lessees. It is not the land, it is not the personal property, it is not the franchises embraced in that instrument. It is the right to possess and use these properties; it is a usufruct.

As establishing the proposition that what the Complainants acquired under their lease was not an ownership for a period of years of the property embraced in the lease, attention is asked to the following authorities and comments upon them:

As soon as a lease has been delivered and accepted by parties competent to contract, a relation is created between lessor and lessee which is known as that of Landlord and Tenant.

Tiedman on Real Prop. Sec. 151, page 116.

A lease for a term of years is not a freehold estate, but a chattel.

Field vs. Howell, 6 Ga., 423;
Hutchison vs. Hodnett, 115 Ga., 993.

In the latter case it is expressly stated on page 994 that—citing authorities—

> "a tenant for years is never seised of the lands "leased. He acquires a right of entry upon the "land, and when he enters, he is possessed not of "the land but of a term for years, while the seisin "of the freehold remains in the lessor, and the les- "see's possession is the possession of him who has "the freehold."

In the case of Sykes vs. Benton, the tenant of a life estate rented to a lessee for the period of the life tenant's life the whole of the land of the life estate. This did not create an "estate" in the Lessee.

Sykes vs. Benton, 90 Ga., 402.

There is, and ever has been, in Georgia no separation of estates, for the purpose of taxation. All the separate estates, into which a fee is susceptible of division, are and ever have been merged in the fee and the fee has been taxed. The life tenant does not pay a tax on a life estate, but upon the whole property for the reason that for the time being he has the title of, and owns, the whole property, and even this is a matter between life tenant on the one hand and the remainder-man or reversioner on the other, in which the State has no concern. The State looks to the property and if during the life estate the life tenant failed to pay the taxes, the State would collect them out of the property, without making any distinction of life estate and fee simple estate.

In the case of W. & A. R. R. Co. vs. W. U. Tel. Co. 138 Ga. 420, it became necessary for the Supreme Court of Georgia to determine the nature of the relation between the Lessor and Lessee under a contract substantially the same in all material respects as that between The Ga. R. R. & Banking Co. and Wadley. The court says, page 430: "The relation of the State to the Lessee of its railroad is that of landlord and tenant. The Lessee has but a usufructuary interest in the posession of the leased premises for the specific uses named therein"—repeating what the court had said in 136 Ga. 625.

BETTERMENTS.

Petitioner in the Writ for Certiorari (Appellant in the main Appeal) contends that in any event Appellees are liable for taxes on property which their money has created. What is that property? It is the renewals and expansions of the rented railroads. It is in no sense property **different** from the original railroad. It is property which this Court has said (Wright vs. The Ga. R. R. & Banking Co.) is "the same property." It is property which has come into existence in order that the Railroad shall keep abreast of the times and thus fulfill its mission. Unquestionably if the Lessor had directly and not through an intermediary brought this property into existence, it would not be taxable.

If the Lessor could do this directly, it could do it by its tenant—especially the tenant under the very Lease, which the Legislature contemplated at the same time that it constructed this scheme of taxation for an owner, who the Legislature intended might at any time become a Lessor. This is exactly what is done in the Lease. It is provided that as a part of their duty as tenants for years, and under their contract, the Lessees shall keep the premises in repair and up to the relative standard of the property when they received it, at their own expense; but that where they make proper additions

they will be considered as having advanced the cost for the Lessor, and after the Lessees shall cease to use these additions by reason of the termination of the Lease, the Lessor will reimburse its agents the Lessees by the payment of a fair value.

After all said and done, this Railroad, increased in value by the growth of the country and by other natural processes, by the incorporation in it of better material and appliances, whenever renewals were made, and by additional tracks, depots, bridges, water tanks and rolling stock, is the same railroad which at its birth was covered by its charter. In its progress no stage can be designated at which the charter ceased to be operative.

If any other view of the subject were true, then The Georgia R. R. & Banking Co. lost this provision of its charter altogether long, long ago. In fact it commenced losing it from the beginning of its operation. The first new rail, laid down in the place of an old one, worn out, passed from under the protection of this provision of the charter. So also as to every new engine and every new car and every new thing about the railroad; so that by the time there had come about a complete renewal, this provision of the charter had spent itself—and the whole railroad became taxable. This Court has recognized two ways by which this exempt property would increase in value, viz: "natural increase in the value" and "renewals, alterations and betterments"; and has said in the clearest language and in more than one place, that the scheme of taxation kept pace with and embraced the increased value from these two sources.

This property has not, by anything which has happended in its history, become subject to taxation. Wheth-

er the temporary tenants of it hold any interest in it which is subject to taxation can be decided when that issue is made. It is sufficient, for the time, to say, **that issue is not made in this case.**

JOSEPH B. CUMMING,

Of Counsel for Respondents and Cross Respondents.

In this case the exemption of the lessor from taxation on its road which it has leased applies to betterments and improvements made by the lessee such as the lessor would have made to meet enlarging business and so also as to rolling stock substituted for that of the lessor and which under the lease belongs to the lessor.

Railroad property jointly used with exempted property but not part of the road originally exempted may be subject to assessment but not in one assessment covering both the classes of property.

201 Fed. Rep. 1023, modified and affirmed.

THE facts are stated in the opinion.

Mr. Samuel H. Sibley, with whom *Mr. John C. Hart* was on the brief, for petitioner. (For abstract of argument see *ante*, p. 675.)

Mr. Alex C. King, with whom *Mr. Jos. B. Currey*, *Mr. Bryan Currey*, *Mr. R. C. Alston* and *Mr. Philip H. Alston* were on the brief, for respondents and cross petitioners.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a bill brought by the railroad companies, respondents, to prevent the collection of a tax upon the Georgia Railroad, operated by them under a lease and assessed to them as their property. The District Court made a decree for the plaintiff with certain exceptions, which was affirmed on appeal and cross appeal by the Circuit Court of Appeals for the reasons given by the District Court. 199 Fed. Rep. 454. 201 Fed. Rep. 1023.

The main question is similar to that disposed of in *Wright* v. *Central of Georgia Railway Company*, just decided, *ante*, p. 674.

By its charter granted on December 21, 1833 (Laws of 1833, p. 256) the stock of the Company and its branches is subject only to a 'tax not exceeding one-half one per cent. per annum on the net proceeds of their investments.' § 15. This language is interpreted and held to constitute

a binding contract in *Wright* v. *Georgia Railroad and Banking Co.*, 216 U. S. 420. So it is admitted that the present tax could not be levied on the lessor. By § 12 of the same charter the Company is authorized to "rent or farm out all or any part of their exclusive right of transportation or conveyance of persons, on the rail-road or rail-roads, with the privilege to any individual or individuals, or other company, and for such term as may be agreed upon." So the State has convenanted that the Company's property shall be exempt from tax except upon its income which it is authorized to make in any of three ways. And as bearing on the different uses of the Company's franchise that were deemed possible in that day, as we remarked in the other case, we may add that by § 13, if any persons intrude upon the railroad by any manner of use thereof they shall forfeit to the Company all the vehicles and animals that may be so intrusively introduced and used; that by § 14 the Company, if it sees fit to farm out any part of its exclusive right, may prescribe the value and size of vehicles to be used or pass on its road, and the locomotive power; and that by § 22, the Company, if it prefers, instead of railroads may construct common roads and use steam carriages thereon.

The plaintiffs are operating the roads in question under a lease made to one Wadley to whose rights they have succeeded. *Georgia Railroad & Banking Co.* v. *Maddox*, 116 Georgia, 64. This instrument purported, in the language quoted above from § 12 of the charter, to 'rent and farm out' the privileges and roads of the lessor for a term of ninety-nine years from April 1, 1881. For the reasons given in the other case we cannot believe that if the company saw fit to gain 'the net proceeds of their investments,' (to one-half of one per cent. of which their tax was limited), by letting the whole road instead of allowing others to introduce carriages, the statute silently opened the right to resume as against the lessee all that

had been renounced as against the lessor. If the fee of the roads is taxable to no one while the liability of the lessor to the above mentioned one-half of one per cent. remains, an attempt to collect a tax upon the fee from the plaintiffs is an attempt on the part of the State to tax the leased property which was completely beyond the reach of its taxing power except in so far as permitted by the contract, the obligations of which could not be impaired without a violation of the contract clause of the Constitution of the United States. Thus the particular features of the case in hand take it without the rule applied in *Rochester Railway* v. *Rochester*, 205 U. S. 236, and other kindred cases, from which we have no purpose to depart.

Some subordinate questions remain. Betterments and improvements of the demised road such as the lessor naturally would have made to meet the necessities of an enlarging business stand on the same footing as the original road and are exempt. *Wright* v. *Georgia R. R. & Banking Co.*, 216 U. S. 420, 427–432. *Gardner* v. *Georgia R. R. & Banking Co.*, 117 Georgia, 522, 532. The rolling stock substituted for or added to that turned over to the lessees became the property of the lessor as soon as acquired and also is exempt like that of which it took the place. The lessee covenants to return the property in as good condition as it was then in, and the lease provides that 'the property substituted for and added to that which is hereby rented and farmed out, shall be the property of' the lessor. 'Shall be' obviously means shall be when so substituted. It is not confined to such substituted property as may be on hand at the end of the lease. The lessor is to be kept continuously the owner of an equipped road. The Railroads not being domiciled in Georgia are not taxable there for stock and bonds of other companies merely appearing to be owned by them. Some necessary and proper improvements were made by the lessor before the lease and paid for by the proceeds of

bonds issued by it. We do not perceive why they should be put on a different footing from the others. And we are not prepared to say that terminals, &c., added to the demised property belonging to the lessor, although brought with $225,000 of money belonging to the lessees, were not reasonable betterments and exempt.

The Atlanta terminals require separate treatment. Besides so much of them as was embraced in the lease, there seems to be other land belonging to the West Point Company, and other land again of the Louisville and Nashville Railroad. By an agreement between the plaintiffs and the West Point Company this property is converted into and used as a joint terminal. The assessment complained of deals with this as a separate entity and item, and in the decree is excepted from the injunction. It appears to us that so much of the property as is part of the exempted line still is exempt. It is used for the purposes of the line, although the relations have become more complex. The rest may be subject to taxation, but not in this assessment. The decree will be modified in this respect, but otherwise is affirmed.

Decree modified and affirmed.

MR. JUSTICE LAMAR took no part in the decision.

Dissenting: MR. JUSTICE HUGHES, MR. JUSTICE PITNEY, MR. JUSTICE MCREYNOLDS.